

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RAYNE DEE WELLS Jr.,

Plaintiffs,

v.

CORRECTIONAL OFFICER JAMES  
McLEAN,

Defendant.

Case No. C10-5097RJB

ORDER ADOPTING A REPORT AND  
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of Magistrate Judge J. Richard Creatura (Dkt. 22), Plaintiff's Motion for Sanctions (Dkt. 24), and Plaintiff's Motion for Appointment of Counsel (Dkt. 25). This Court has reviewed the Report and Recommendation, objections to the Report and Recommendation, the motions, responses to the motions, and the remaining record.

The facts are recited in the Report and Recommendation (Dkt. 24, at 1-2) and are adopted here by reference. This opinion will first address Plaintiff's motions and then the Report and Recommendation.

A. Motion for Appointment of Counsel

Plaintiff moves for appointment of counsel. Dkt. 25. This is his second motion for appointment of counsel. Dkt. 10. A district court may appoint counsel to represent an indigent

1 civil litigant in exceptional circumstances. *See* 28 U.S.C. § 1915 (e). “A finding of exceptional  
2 circumstances requires an evaluation of both ‘the likelihood of success on the merits [and] the  
3 ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal issues  
4 involved.’” *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)(*internal quotations*  
5 *omitted*).

6  
7 Plaintiff has made no showing that he is likely to succeed on the merits. Plaintiff has  
8 demonstrated that he can sufficiently articulate his claims *pro se* in light of the complexity of the  
9 legal issues involved. Plaintiff’s motion for appointment of counsel (Dkt. 25) should be denied.

10 B. Motion for Sanctions

11 Plaintiff moves for sanctions under Fed. R. Civ. P. 37(a), arguing that Defendants have  
12 failed to provide answers to requests for admissions. Dkt. 24. Plaintiff’s motion should be  
13 denied. First, he fails to show that he served Defendant with a copy of the requests for  
14 admissions. Secondly, he has not moved for an order to compel the discovery pursuant to Fed.  
15 R. Civ. P. 37. Lastly, he has made no showing that he has made an effort to confer in good faith  
16 with Defendant regarding the subject discovery as is required under Western District of  
17 Washington Local Rule of Civil Procedure 37 (a)(1)(A). Plaintiff’s Motion for Sanctions (Dkt.  
18 24) should be denied.

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20 C. Report and Recommendation

21 The Report and Recommendation recommends dismissal of this Section 1983 action with  
22 prejudice for failing to exhaust administrative remedies. Dkt. 24. Plaintiff files objections,  
23 contends this prior declaration where he acknowledges receipt of the response to his level II  
24 grievance was not accurate, and that he now believes that he did not receive the response. Dkt.  
25 23. Despite his prior testimony, he now urges the Court to force the Defendants to show that  
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1 they complied with their own policy and provided a response to his level II grievance. *Id.*  
2 Plaintiff's argument is without merit. Defendants filed the Declaration of Donald Frederick, in  
3 which Defendants state that they responded to Plaintiff's level II grievance. Dkt. 12-2, at 5.  
4 Plaintiff has acknowledged he received the response, and only now that he faces dismissal does  
5 he change his version of events. Plaintiff's objection is not a valid basis to reject the Report and  
6 Recommendation. Plaintiff additionally argues that the prison officials should have extended his  
7 time to file a level III grievance or told him in writing "that the time had been extended." Dkt.  
8 23, at 2. Plaintiff cites no authority for this proposition. The Report and Recommendation  
9 should be adopted and the case dismissed with prejudice.  
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11 Accordingly it is hereby **ORDERED**:

- 12 1. Plaintiff's Motion for Appointment of Counsel (Dkt. 25) is **DENIED**; Plaintiff's  
13 Motion for Sanctions (Dkt. 24) is **DENIED**;
- 14 2. The Court **ADOPTS** the Report and Recommendation (Dkt. 22);
- 15 3. This action is **DISMISSED WITH PREJUDICE** as Plaintiff cannot exhaust  
16 his claim.
- 17 4. The Clerk is directed to send copies of this Order to Plaintiff, and to the Hon. J.  
18 Richard Creatura.

19 DATED this 9th day of July, 2010.

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21 ROBERT J. BRYAN  
22 United States District Judge  
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